No. 04-312

Supreme Court, U.S.
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In The Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,

Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented need to be restated because they contain misstatements of the facts and issues presented to the Courts below.

First, in their Questions Presented and throughout their Petition, the Petitioners claim that Trigon's decisions as an insurance company were connected to the boycott of chiropractors by the medical doctor members of the American Medical Association, which ended in 1980.[1] Petition at i, 2-3, 6. However, as the Fourth Circuit found, there is absolutely no evidence that Trigon's policies were related in any way to the American Medical Association's boycott of chiropractors. App. 6a ("Although Trigon is a licensee of Blue Cross & Blue Shield of America, there is no record evidence connecting Trigon to this boycott.").[2]

Second, the Petitioners suggest that, in addition to the alleged conspiracy between Trigon and the medical doctors who served on its Managed Care Advisory Panel, there was a conspiracy between "a health insurance company [Trigon] and its medical doctor employees." Petition at i. Yet, the record is clear that the Petitioners made no such claim below.

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[1] *See Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 356, 374 (7th Cir. 1990).

[2] The Fourth Circuit's opinion is reported at *American Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir. 2004).

App. 13a ("American Chiropractic did not argue that Trigon conspired with its own employees serving on the MCAP."). Moreover, any claim that Trigon conspired with its own employees clearly would be barred by the intracorporate immunity doctrine. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

The two Questions Presented should be more appropriately combined into one and restated as follows:

> Did the Fourth Circuit correctly hold that Trigon and a number of medical doctors, who were appointed by their medical associations to serve on a committee created by Trigon to provide advice on clinical issues related to Trigon's managed care plans, had a unity of interest such that they were legally incapable of conspiring under the intracorporate immunity doctrine?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondents Trigon Healthcare, Inc., Trigon Insurance Co., and Trigon Health and Life Insurance Company are all 100% wholly-owned subsidiaries of Anthem, Inc., which is a publicly traded corporation. No other publicly held corporation owns 10% or more of Anthem, Inc.'s stock. Respondent Trigon Administrators, Inc. was previously a wholly-owned subsidiary of Trigon Healthcare, Inc., but has since been sold to CompManagement, Inc., which is not a publicly traded corporation and is not affiliated with Anthem, Inc. Mid-South Insurance Company was previously a wholly-owned subsidiary of Trigon Healthcare, Inc., but has since been sold to World Insurance Company, which is not a publicly traded corporation and is not affiliated with Anthem, Inc. Although Petitioners identify Anthem, Inc. as one of the Defendants-Appellees in their Petition at vi, Anthem, Inc. was never named as a Defendant and was not an Appellee in the proceedings below.

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STATEMENT OF THE CASE

Trigon is compelled to submit the following Statement of the Case to correct the misstatements of facts contained in the Petitioners' Statement of the Case and Background of the Case.

In August 2000, two chiropractic associations, individual chiropractors and a number of patients (collectively, "Petitioners"), sued Trigon Healthcare, Inc. and several of its subsidiaries (collectively, "Trigon") and the National Blue Cross and Blue Shield Association[3] in an eight-count Complaint, alleging an antitrust conspiracy in violation of the Sherman Act (15 U.S.C. § 1), unlawful monopolization, a RICO violation, a state law conspiracy, a state insurance law violation, tortious interference and breach of contract. After full discovery, the United States District Court for the Western District of Virginia, Abingdon Division, granted Trigon's summary judgment motion on the antitrust conspiracy claim and all of the other remaining claims that previously had not been dismissed. App. 43a-58a.[4]

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[3] The Petitioners voluntarily dismissed the National Blue Cross and Blue Shield Association as a defendant early in the case.

[4] The District Court's opinion is reported at *American Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 258 F. Supp. 2d 461 (W.D. Va. 2003).

The undisputed facts in the record established that Trigon's business, as a for-profit health insurance company, consists of providing medical coverage to its members in accordance with the terms of the relevant health plans and making a network of healthcare providers, including medical doctors, hospitals, pharmacies, chiropractors, and therapists, available through which those members can obtain medical services. App. 4a. Trigon creates this network of healthcare providers by entering into contracts with providers who are willing to abide by Trigon's terms and conditions, as set forth in Trigon's provider agreements. *Id.* Trigon attempts to control and limit its costs so that it can price its insurance products competitively. *See id.*; *see also* App. 51a-52a. Since Trigon's largest cost category is its payments to providers, Trigon's economic incentive is to pay providers, including chiropractors, at the lowest possible price that will enable it to maintain an adequate network to provide access and covered services to its members. *Id.*

Trigon has provided coverage for chiropractic services since the 1980s, and Trigon "acknowledges that chiropractic care has a health effect, a positive health effect when rendered appropriately." App. 4a-5a. During the relevant time period, the use of chiropractors by Trigon members substantially increased. App. 21a. From 1996 to 2001, the number of chiropractors participating in Trigon's networks nearly doubled. App. 5a. By entering into provider contracts with many new chiropractors, Trigon increased the supply of chiropractors available for its members, which increased both the access of its members

and the opportunities for referrals to chiropractors. *See id.* Furthermore, the number of Trigon members who obtained treatments from chiropractors nearly tripled. *Id.* In addition, Trigon's payments to chiropractors for providing treatments to Trigon's members almost doubled, from approximately $12.4 million to $21.5 million. *Id.* Finally, Trigon's payments to chiropractors as a percentage of its total payments to all healthcare providers increased by 14%, which was at the expense of medical doctors and other providers, whose share of Trigon's payments decreased. App. 51a.

Despite the substantial increase in utilization of and payments to chiropractors during the relevant time period, the Petitioners filed a claim against Trigon, alleging that Trigon intentionally harmed chiropractors and furthered the interests of medical doctors by discouraging Trigon's members from using, and by preventing referrals to, chiropractors. Specifically, the Petitioners claimed that Trigon conspired with the medical doctor members of one of its committees, the Managed Care Advisory Panel ("MCAP"), to create a low back pain guideline, entitled "Managing Low Back Problems in Adults," that allegedly de-emphasized the importance of spinal manipulation because it did not recommend spinal manipulation in place of medications for the treatment of back pain and did not include a definition of manipulation as the type given by

chiropractors.[5]

The evidence, however, was undisputed that Trigon and the MCAP members had a unity of interest, and also had not entered into a conspiracy to harm chiropractors. The MCAP was formed by Trigon and chaired by a Trigon officer. App. 10a. The members consisted of six Trigon employees and nine medical doctor representatives of various professional associations who were appointed to serve on this committee. *Id.* The MCAP had no decision-making authority and had no ability to control Trigon's decisions. *Id.* Rather, its function was limited to providing input, advice and expertise on clinical issues relating to Trigon's managed care plans, such as quality control initiatives. *Id.* The MCAP medical doctor members also were never given any information regarding Trigon's specific payment policies for any providers. *Id.* As the District Court indicated, "[o]f course, there is no evidence in the record that Trigon ever discussed with the Medical Society of Virginia, or any other professional association, any policies harmful to chiropractic providers." App. 55a.

Furthermore, the Petitioners never presented any evidence to show that any referrals to chiropractors actually

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[5] The Petitioners pursued several other conspiracy theories against Trigon, and the District Court also granted Trigon's summary judgment motion as to these claims, which the Fourth Circuit affirmed. The Petitioners have not appealed the rulings on these other conspiracy claims.

were prevented, or that any patients were shifted to medical doctors, after Trigon's guideline was published. App. 53a. In fact, as both Courts below explained, the undisputed evidence established that there was no effort by Trigon to harm chiropractors and that Trigon had no economic incentive to prevent referrals to chiropractors. App. 22a, 51a-52a.

The evidence was also undisputed that Trigon's low back pain guideline was drafted solely by Trigon's employees, not by the MCAP, and was based on the 1994 federal AHCPR guideline. App. 11a, 52a. No changes were made to the text of Trigon's guideline after the MCAP reviewed it, and Trigon's employees made the final decision regarding the content of the guideline. App. 12a, 17a-18a. Significantly, the guideline did not have any relation to Trigon's coverage and reimbursement policies. App. 10a.[6]

Based on these undisputed facts, the District Court found that Trigon was entitled to summary judgment. Relying on *Copperweld Corp. v. Independence Tube Corp.*,

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[6] The Petitioners argue that Trigon's low back pain guideline was an "insurance-reimbursement guideline[], which created industry standards affecting reimbursement." Pet. at 2. This claim is a misstatement of the facts. The uncontroverted evidence was that the guideline had no relation to Trigon's payment policies for chiropractors. App. 10a. In addition, there was no evidence that Trigon's guideline became an industry standard.

467 U.S. 752, 769 (1984), the District Court applied the doctrine of intracorporate immunity and held that a "corporation cannot conspire with its employees or agents because 'the officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.'" App. 47a.

The District Court then considered whether the independent personal stake exception to the intracorporate immunity doctrine applied and found that the Petitioners failed to present "any evidence to show that any of the Trigon panel members competed with them for the treatment of neuromusculoskeletal disorders." App. 49a.

As to the allegation that Trigon conspired with the professional organizations that had representatives on the MCAP, the District Court evaluated the conspiracy claim on the merits and held that "the record demonstrates that no conspiracy existed." App. 50a. The District Court stated that the Petitioners failed to adduce any direct evidence of a conspiracy, and the circumstantial evidence presented by Petitioners failed "to exclude the possibility of independent action by the [defendants]." App. 50a-51a (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) & *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

Finally, the District Court explicitly held that

Trigon's adoption of the low back pain guideline in 1996 was not proof of the existence of a conspiracy. According to the District Court,

> [t]his guideline, entitled "Managing Low Back Problems in Adults," was drafted by Trigon employees and considered (but not revised) by the Managed Care Advisory Panel. Trigon contends that its guideline, which was distributed to all of its providers including chiropractors, was merely a simplified version of a clinical guideline published by a federal agency in 1994. . . . The plaintiffs point to the opinion of their expert, Scott Haldeman, that the Trigon guideline is "inconsistent" and "in conflict" with the federal guideline, mainly because while the Trigon guideline recommends "manipulation" as a treatment option, it omits the federal definition of manipulation. The expert believes that the federal definition favors the type of manipulation given by chiropractors over other providers. Even assuming that this opinion is credible – and I find it very thin – it is insufficient circumstantial proof of a conspiracy. It is clear that Trigon's guideline follows the federal guideline in a highly abbreviated form. *The uncontested evidence is that since Trigon's guideline was issued in 1996, no chiropractor provider ever*

> *complained to Trigon about the omission of the definition of manipulation or anything else about it. Moreover, since it was issued, use of chiropractic treatment by Trigon subscribers has substantially increased.*

App. 52a-53a (internal footnotes omitted) (emphasis added).

On appeal, the Fourth Circuit unanimously affirmed the District Court's summary judgment decision. The Fourth Circuit "agree[d] with the district court that, under the intracorporate immunity doctrine, Trigon lacked the legal capacity to conspire with the medical doctors on the MCAP." App. 16a. The correct inquiry, according to the Fourth Circuit, was "whether the medical doctors, *in their role as members of the MCAP*, share a unity of interest with Trigon that makes them corporate agents of Trigon," not whether "medical doctors and insurance companies . . ., generally speaking, share a unity of interest," as the Petitioners argued. App. 17a (emphasis added). The Fourth Circuit concluded:

> Because Trigon established the MCAP to offer input on clinical issues faced by Trigon, the individual medical doctors, in their role as members of the MCAP, shared the same interest as Trigon: addressing clinical issues in a manner that would best serve its consumers, the plan enrollees. *The MCAP is without question a corporate agent of Trigon,*

> *chaired by a Trigon employee, and we believe that the intracorporate immunity doctrine applies to its actions.* The decision to consult with doctors on the MCAP does not "represent the sudden joining of economic forces that section one is designed to deter and penalize." *Oksanen* [*v. Page Mem'l Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc)]. By creating the MCAP, Trigon did not bring together independent economic forces. Instead, Trigon had "ultimate control" over the MCAP's actions and was able to employ the MCAP to pursue its interests. In fact, we are presented with even stronger reasons for applying the doctrine here than we were in *Oksanen* because, in *Oksanen*, the peer review committee and the hospital were legally distinct entities. The MCAP is not legally distinct from Trigon.

Id. (emphasis added).

In addition, the Fourth Circuit also reviewed the merits of the conspiracy claim and concluded that the evidence presented by the Petitioners was insufficient to establish the existence of a conspiracy between Trigon and the medical associations whose representatives served on the MCAP. The Fourth Circuit stated:

> At most, the MCAP meeting shows contact between two independent economic actors, but "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy." *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 (4th Cir. 1986). . . .
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> . . . .
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> . . . They have pointed to no evidence that Trigon conspired with any entity in forming its policies. *In fact, the only evidence in the record is that all of the actions in dispute were taken unilaterally by Trigon employees. In the face of Trigon's affidavits that it acted unilaterally, American Chiropractic needed more to create a genuine issue of material fact.*

App. 21a-22a (emphasis added).[7]

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[7] Petitioners claim that the Fourth Circuit ignored the documentary evidence regarding the issuance of Trigon's low back pain guideline when it held that there was insufficient evidence to prove the existence of a conspiracy. Pet. at 18. This claim is plainly incorrect and is a mischaracterization of the Fourth Circuit's decision since it expressly analyzed the documents relating to the MCAP and the guideline. App. 11a-12a.

Subsequently, the Fourth Circuit denied the Petitioners' Petition for Rehearing and Rehearing En Banc. App. 60a-61a. While the District Court and Fourth Circuit granted summary judgment to Trigon as to all of the Petitioners' claims, the Petitioners have appealed only the portion of the decision relating to the intracorporate immunity doctrine.

ARGUMENT

The Fourth Circuit unanimously affirmed the District Court's determination that Trigon was entitled to summary judgment on all claims. Its decision contained detailed findings of fact which were derived from the factual record in the summary judgment proceeding.

The Court should not grant certiorari because the Fourth Circuit based its decision on independent and dispositive grounds that the Petitioners have not appealed. In addition, the decision does not conflict with any decision of this Court or any other court of appeals and does not present any legal issue warranting this Court's review.

I. The Petition Is Not Certworthy Because The Fourth Circuit Decided The Conspiracy Claim On Independent Grounds, Which Petitioners Did Not Appeal.

Supreme Court Rule 14(1)(a) states, in part, that "[o]nly the questions set out in the Petition, or fairly included therein, will be considered by the Court." The only issue raised by the Petitioners in the Questions Presented is whether the Fourth Circuit correctly applied the intracorporate immunity doctrine. As set forth below, the Petition is not certworthy because the Petitioners did not challenge in their Questions Presented the Fourth Circuit's independent and dispositive finding on the merits that the Petitioners presented insufficient evidence to prove the

existence of a conspiracy.

All of the Questions Presented explicitly state that the Petitioners are appealing whether the Fourth Circuit incorrectly applied the intracorporate immunity doctrine, as articulated in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and its progeny. Pet. at i. The District Court's decision, however, was not based solely on its holding that, under *Copperweld*, Trigon was incapable of conspiring with the independent medical doctors who were appointed as representatives of various medical associations to serve on Trigon's MCAP. Significantly, the District Court also evaluated the merits of the antitrust conspiracy claim and held that there was insufficient evidence to prove the existence of a conspiracy. As the District Court stated, "[t]he specific alleged anticompetitive conduct complained of by the plaintiffs does not support the existence of an unlawful conspiracy." App. 52a.

The Fourth Circuit unanimously affirmed both of these findings. First, the Fourth Circuit ruled that the intracorporate immunity doctrine barred the claim that Trigon and the MCAP members conspired to harm chiropractors. Second, the Fourth Circuit analyzed the conspiracy claim on the merits and held that the Petitioners presented insufficient evidence to establish the existence of a conspiracy. In fact, it concluded that "the only evidence in the record is that all of the actions in dispute were taken unilaterally by Trigon employees." App. 22a.

Accordingly, both lower courts specifically analyzed whether the Petitioners presented sufficient evidence to prove that Trigon and the medical associations, which were represented on the MCAP, engaged in an unlawful conspiracy by adopting a low back pain guideline that allegedly harmed chiropractors. Moreover, the only evidence presented by the Petitioners of the alleged conspiracy between Trigon and the medical associations consisted of the contacts and communications at the MCAP meeting. Thus, the allegation that the medical associations conspired with Trigon was based solely on the evidence relating to the conduct of the associations' representatives on the MCAP. In other words, the only way in which the medical associations were alleged to have conspired with Trigon was through the activities of their medical doctor representatives who served on the MCAP.

In deciding that this evidence was insufficient to withstand summary judgment, the Fourth Circuit found that the MCAP meeting at most showed contacts between Trigon and the independent MCAP members, "but 'mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy.'" App. 21a (quoting *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 (4th Cir. 1986)). Therefore, the Fourth Circuit determined that the MCAP meeting discussions about the guideline did not establish sufficient evidence of a conspiracy.

As a result, both the Fourth Circuit and the District

Court fully considered the merits of the antitrust conspiracy claim and found that the Petitioners failed to present sufficient evidence to prove the existence of a conspiracy. App. 21a-22a. This portion of the Fourth Circuit's decision is not challenged in the Questions Presented and thus has not been appealed.

By limiting their two Questions Presented to whether the Fourth Circuit correctly applied the intracorporate immunity doctrine, Petitioners have failed to seek this Court's review of the independent and dispositive issue of the sufficiency of the evidence to establish a conspiracy between Trigon and the medical doctors or the associations they represented. Sup. Ct. R. 14(1)(a).[8] Thus, were the Court to review the intracorporate immunity issue raised in the Petition, its decision on that issue would be merely advisory and would have no practical impact on the outcome because the Fourth Circuit also dismissed the antitrust conspiracy claim on the merits. As a result, the Petition is not certworthy and should be denied.

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[8] The question of whether the evidence was sufficient to establish the existence of a conspiracy also is not "fairly included" within the "questions set out in the Petition." Sup. Ct. R. 14(1)(a). The application of the intracorporate immunity doctrine centers on consideration of whether the parties were legally capable of conspiring, which is far different from the question of whether there is sufficient evidence, direct or circumstantial, to prove the existence of an anticompetitive conspiracy.

In addition, if Petitioners now claim that they are seeking review of the Fourth Circuit's decision on the merits of the antitrust conspiracy claim, their Petition should likewise be denied because they would be asking the Court to hold that the Fourth Circuit's factual findings were in error or that the Fourth Circuit misapplied the law to the facts. Neither of those are valid grounds for granting a petition for writ of certiorari. Sup. Ct. R. 10; *see also Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (Court "cannot undertake to review concurrent findings of fact of two courts below in the absence of a very obvious and exceptional showing of error").

II. The Fourth Circuit's Decision Is Consistent With Legal Principles Established In *Copperweld* And *Allied Tube*.

A. The Fourth Circuit's Decision Specifically Applied The Holding Of *Copperweld* To The Facts Of This Case.

Petitioners argue that the Fourth Circuit's decision "directly conflicts with and guts" this Court's holding in *Copperweld*. Pet. at 12. That argument is meritless and reflects a misreading of the Fourth Circuit's decision below. Contrary to the Petitioners' assertion, the Fourth Circuit clearly followed the principles set forth in *Copperweld*. App. 14a, 18a. It began by explaining that *Copperweld* held

that a corporation and its officers, a corporation and its unincorporated divisions, and a parent corporation and its wholly-owned subsidiary are legally incapable of conspiring because they have a "unity of purpose or a common design." App. 14a.

The Fourth Circuit then expressly applied the principles established in *Copperweld* to the specific facts in this case and held that "the medical doctors appointed to serve on Trigon's MCAP had a unity of interest with Trigon in "addressing clinical issues in a manner that would best serve [Trigon's] consumers, the plan enrollees."[9] App. 17a. The Fourth Circuit found that the MCAP was "without question a corporate agent of Trigon, chaired by a Trigon employee," and that "Trigon had 'ultimate control' over the MCAP's actions." *Id.* In fact, the Fourth Circuit said that this case presented even stronger reasons for applying the intracorporate immunity doctrine than in its *Oksanen*

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[9] The Petitioners claim that the Fourth Circuit's decision is inconsistent with *Copperweld* because "healthcare providers (like medical doctors, doctors of chiropractic, etc.) are necessarily separate and distinct economic actors vis-à-vis healthcare insurers." Pet. at 14. However, the fact that Trigon and the MCAP members are separate economic actors is not the relevant issue under *Copperweld*. Instead, the issue is whether Trigon and the MCAP members have a "unity of purpose" in the particular activity being challenged. The Fourth Circuit correctly applied this standard in evaluating the activities of the MCAP.

decision because the hospital and peer review committee were legally distinct entities in *Oksanen* whereas, in this case, the MCAP and Trigon were not. *Id.* The Fourth Circuit, again relying on *Copperweld*, concluded:

> American Chiropractic's argument paints with too broad a brush, and would, in effect, undercut much of the rationale of the intracorporate immunity doctrine by focusing on form over substance. Penalizing "coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits."

App. 18a (quoting *Copperweld*, 467 U.S. at 771).

The Fourth Circuit's explicit reliance on *Copperweld* demonstrates that this case does not present an inconsistency with a Supreme Court decision or an unsettled question of federal law. Petitioners' challenge to the Fourth Circuit's decision is not based on a conflict with *Copperweld*, but rather is based on their disagreement with the Fourth Circuit's application of *Copperweld* to the facts of this case. The Petitioners' claim that the Fourth Circuit incorrectly applied *Copperweld* to the facts of this case, however, is not a proper or sufficient basis for the grant of certiorari because it asks the Court to determine whether the Fourth Circuit "misappl[ied] a properly stated rule of law." Sup. Ct. R. 10.

Furthermore, contrary to Petitioners' suggestion, this case does not present a proper vehicle for clarifying whether *Copperweld* applies to the more complex entities and corporate arrangements involving a high degree of corporate and economic integration that were at issue in *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002). *Fraser* involved the complicated and unique relationship between a sports league and various operators/investors of individual teams in the league. This case is not similar to *Fraser* because it does not involve the types of complex arrangements and degree of economic integration between different corporate entities that were at issue in that case. Instead, this case involves only the extension of *Copperweld* to persons who, as the undisputed evidence demonstrated, were serving on a corporate committee and were acting as agents of Trigon. Accordingly, it would be improper for the Court to consider whether *Copperweld* reaches the types of complex arrangements described in *Fraser* because they are not relevant to this case.

B. This Court's Decision In *Allied Tube* Is Inapplicable To This Case.

Petitioners also challenge the Fourth Circuit's decision as contrary to *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). However, that case

is completely inapposite to the issues presented in this case.[10] The *Allied Tube* decision related to the standard-setting activities of a private trade association. The trade association had set performance standards for electrical products, which were often incorporated into municipal fire codes. *Id.* at 495-96. A manufacturer of plastic electrical conduit sought to have the trade association list plastic conduit as an acceptable alternative to steel conduit in its code. *Id.* at 496. Manufacturers of steel conduit and other interested parties, however, agreed among themselves to recruit numerous individuals to join the trade association, pay those individuals' expenses and organize those individuals at the association's annual meeting as a bloc vote against the proposal to include plastic conduit in that year's code. *Id.* at 497. This Court held that the *Noerr-Pennington* doctrine did not protect the attempts by those manufacturers and other interested parties to influence the trade association's standard-setting activities and, thus, Section 1 of the Sherman Act applied to them. *Id.* at 501-02.

Petitioners argue that "[i]n *Allied Tube* . . . the Court held that when an association, like the MCAP, combines to set standards in an industry, like the Trigon-adopted back pain referral and treatment guidelines, the standards set by the combination has a 'serious potential for anticompetitive harm.'" Pet. at 13 (quoting *Allied Tube*, 486 U.S. at 505).

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[10] Not surprisingly, *Allied Tube* was not cited by any of the parties in the summary judgment or the appeal proceedings in the courts below.

This argument not only is incorrect, but also is based on a fundamental misstatement of the facts. First, the MCAP is not a trade or industry association. Rather, the MCAP is a formal corporate committee that was formed by Trigon. The committee is not legally distinct from Trigon and it had no decision-making authority. App. 17a-18a. Second, Trigon did not establish any industry standards. It only published an internal guideline that was offered to its contracting providers for use in connection with the treatment of Trigon's members. App. 10a. This clearly is not an industry standard-setting case because Trigon's guideline did not have any application or relation to any other healthcare insurance companies, their network providers, or their members. As a result, aside from the standard description of the meaning of a conspiracy under Section 1 of the Sherman Act, the *Allied Tube* decision does not have any relevance to the facts or issues in this case.

III. The Fourth Circuit's Decision Does Not Conflict With The Sixth, Eighth, Or Eleventh Circuit's Opinions.

The Petitioners contend that the case is certworthy because the Fourth Circuit's decision conflicts with decisions of the Sixth, Eighth, and Eleventh Circuits. This contention has no merit and misconstrues the issues relevant to this case.

The Sixth and Eleventh Circuits' decisions referenced by the Petitioners are hospital staff privileges

cases in which the intracorporate immunity doctrine was considered. The majority of the Circuits that have considered the application of the intracorporate immunity doctrine to hospital staff privileges cases have held that a hospital is legally incapable of conspiring with its medical staff. For example, the Fourth Circuit reached that conclusion in a separate decision in *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc).

Similarly, the Sixth Circuit's decision in *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), also held that the intracorporate immunity doctrine bars an allegation of conspiracy between a hospital and its medical staff. Petitioners, however, misrepresent the holding in *Nurse Midwifery* by stating that "[t]he Sixth Circuit reversed [the District Court's] holding . . . that the hospitals were incapable of illegally conspiring because the doctors were 'agents' of the hospital and thus they were not separate actors able to combine or conspire." Pet. at 19. Contrary to the Petitioners' representation, the *Nurse Midwifery* opinion expressly states that "the intra-corporate conspiracy doctrine *prevents* a finding of conspiracy between a hospital and its medical staff." *Nurse Midwifery*, 918 F.2d at 614 (emphasis added). The Sixth Circuit held that the intracorporate immunity doctrine applied because "the members of the medical staff were acting as agents of the hospital."[11] *Id.* As

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[11] The Sixth Circuit also indicated that the intracorporate immunity doctrine "does not preclude a conspiracy among

a result, the Fourth Circuit's previous decision in *Oksanen*, involving hospital staff privileges, is entirely consistent with the Sixth Circuit. *Oksanen*, 945 F.2d at 703.

On the other hand, the Petitioners are correct that a few Circuits have held that a hospital is legally capable of conspiring with members of its medical staff in staff privileges cases, such as the Eleventh Circuit's decision in *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990), cited by Petitioners. However, the Petitioners' reliance on this conflict in the Circuits is misplaced and has no relevance to this case. The conflict in the Circuits relating to hospital staff privileges has no bearing on this case because it simply is not a hospital staff privileges case. There are a unique set of facts and considerations that are analyzed in determining whether the intracorporate immunity doctrine should apply to a hospital staff privileges case. Significantly, this case involves a different set of facts and circumstances. Therefore, this case is not a proper vehicle for this Court to resolve the conflict among the Circuits as to whether the intracorporate immunity doctrine should apply in hospital staff privileges cases.

The Petitioners also argue that the Fourth Circuit's

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individual members of the medical staff," *Nurse Midwifery*, 918 F.2d at 614, but that qualification is not applicable to this case because the Petitioners did not assert a conspiracy claim against any individual medical doctors.

decision conflicts with the Eighth Circuit's decision in *Mount Pleasant v. Associated Electrical Cooperative, Inc.*, 838 F.2d 268 (8th Cir. 1988). There is no conflict here because *Mount Pleasant* followed *Copperweld* and analyzed facts that are unrelated to the facts of this case. It did not involve the application of intracorporate immunity to an insurance company's appointment of medical doctors to a corporate committee; rather, it involved members of a cooperative electrical organization pursuing a common goal – the provision of low-cost electricity to its rural consumer-members. 838 F.2d at 276. The court found that there was no evidence that any generation-and-transmission cooperative defendant "ever pursued interests antithetical to those of the [rural electrical] cooperative as a whole." *Id.* The court also stated that the plaintiff had the burden to show that the defendant cooperatives had "pursued interests diverse from those of the cooperative itself." *Id.*

On the facts of that case, the Eighth Circuit applied the intracorporate immunity doctrine to bar the antitrust conspiracy claim because the plaintiff failed to show that any of the member cooperatives had acted inconsistent with the interests of the rural cooperative. *Id.* at 277. Applying the Eighth Circuit's analysis to this case, the same result would be reached because the Petitioners did not present any evidence that the medical doctors on the MCAP did anything that was inconsistent with Trigon's interests. Thus, there is no conflict between the two decisions as to the applicable law, and they also involve highly different factual settings.

Finally, the holding in this case is not in conflict with the decision of any other Circuit. In fact, it is entirely consistent with the only other Circuit that considered a similar set of facts, *Podiatrist Ass'n v. La Cruz Azul de P.R., Inc.*, 332 F.3d 6 (1st Cir. 2003). In *Podiatrist Ass'n*, the plaintiffs – a podiatric association and several podiatrists – complained that two health care insurance companies conspired with medical doctors who were involved in their corporate governance by excluding podiatrists and podiatric care from their basic health insurance coverages and by reimbursing podiatrists at lower rates than those paid to medical doctors for comparable services. 332 F.3d at 10-11. The evidence in *Podiatrist Ass'n* showed that one of the insurance companies had eight medical doctors on its nineteen-member Board of Directors and three medical doctors on its seven-member executive committee, which exercised responsibility over corporate policies between board meetings. *Id.* at 10. The other insurance company, before it changed its corporate governance structure, had seven medical doctors on its twenty-eight member board of directors; two medical doctors on its eight-member fees and contracts committee, which was responsible for proposing and evaluating benefits packages and reimbursement policies; and three medical doctors as the only members of its medical advisory committee. *Id.* The record also established that the insurance companies' respective boards of directors exercised ultimate control over all of their companies' major decisions concerning benefits and reimbursement rates. *Id.*

Based on these facts, the podiatrists argued that because independent medical doctors had occupied positions on the insurance companies' boards of directors, the fees and contracts committee and the medical advisory committee, the insurance companies had conspired with the medical doctors to institute the insurance policies that harmed podiatrists. *Id.* at 15-16.

The First Circuit analyzed the physicians' activities under *Copperweld*, and applied the intracorporate immunity doctrine to bar the conspiracy claims, holding that "agreements between two or more actors who operate within and for the benefit of a single economic enterprise do not satisfy the concerted action requirement of Section 1." *Id.* at 13. The First Circuit further explained that "the plaintiffs have not articulated a claim that involves anything more than activity occurring within a single enterprise." *Id.* at 14.

Like the podiatrists, the Petitioners here allege that medical doctors who served on a committee of an insurance company conspired with the company to harm chiropractors. In both cases, the Circuit Courts held that the intracorporate immunity doctrine barred the conspiracy claims because the medical doctors serving on the insurance company committees were acting within and for the benefit of a single enterprise. Accordingly, the only two Circuits that have examined this factual scenario have reached the same conclusion that the intracorporate immunity doctrine bars a conspiracy under these circumstances.

In sum, the Petition should be denied because the Fourth Circuit's decision is not in conflict with the decisions of the other Circuits, and is not a proper vehicle for addressing the different results reached in hospital staff privileges cases.

CONCLUSION

For the foregoing reasons, Trigon respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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